

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

ALL SEASONS CONSTRUCTION, INC.

and

UNITED BROTHERHOOD OF CARPENTERS
& JOINERS OF AMERICA, LOCAL UNION
NO. 764, AFL-CIO

Cases 15-CA-14748
15-CA-14793
15-CA-14816
15-CA-15156

Joseph A. Hoffman, Jr. Esq. for the General Counsel.
Mr. Edward L. Angel, of Shreveport, LA, for the
Respondent.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge: The National Labor Relations Board (Board) in its decision and order herein, *All Seasons Construction, Inc.*, 336 NLRB 994 (2001) received herein as General Counsel's Exhibit 1(a), affirmed Judge Jane Vandeventer's decision and ordered, as here pertinent, the Respondent to (a) offer employment to Roy Myers, Paul Cirulli, Randolph Mills, Herbert Rogers, and Sammy Watkins, and make them whole for any loss of pay or other benefits they may have suffered because of Respondent's unlawful refusal to consider them for hire or to hire them, and (b) offer reinstatement to Ron Madewell, Jack Wood, Sims Gafford, and Harold Cotton, and make them whole for any loss of pay or other benefits they may have suffered because of Respondent's unlawful conduct toward them. The Board's decision indicates that only General Counsel filed exceptions to the Judge's decision.

On August 28, 2002 the United States Court of Appeals for the Fifth Circuit ordered that the Board's unopposed application for summary enforcement be granted, it entered a judgment enforcing the Board's order, and it ordered the Respondent to abide by the Board's order. General Counsel's Exhibits 1(c) and (d).

On October 30, 2002, a backpay compliance specification and notice of hearing issued alleging the amount of backpay due to Myers, Cirulli, Mills, Rogers, Gafford, Cotton, and Madewell. General Counsel's Exhibit 1(e). The hearing was scheduled for December 19, 2002 and the Respondent was directed to file an answer within 21 days from the date of the specification. The copies of the specification which were mailed to Respondent and the Charging Party were returned because of mistakes in the addresses.

On November 29, 2002, the compliance specification and notice of hearing was again mailed to the Respondent and to the Charging Party, and a representative of the Respondent signed the receipt for the document. General Counsel's Exhibit 1(g).

On December 4, 2002, an order rescheduling the hearing from December 19, 2002, to February 10, 2003, was mailed, as here pertinent, to the parties. General Counsel's Exhibit 1(h) and (i).

On December 31, 2002, Edward L. Angel, who has been the owner and the President of the Respondent since the company was founded in 1984, filed an answer to the backpay compliance specification and notice of hearing. Angel disputed the accuracy of the figures in the specification regarding computed back pay with respect to Myers, Cirulli, Mills, Rogers, Gafford, Cotton, and Madewell. General Counsel's Exhibit 1(j).¹

On January 20, 2003, Angel filed a corrected answer (with a handwritten date of "Jan 10, 2003") to the backpay compliance specification and notice of hearing. Angel disputed the accuracy of the figures in the specification, arguing that the measure of the gross back pay for each discriminatee was incorrect; that Myers had not provided any documentation to support loss of wages in the amount of \$9,267; that Cirulli, Mills, Gafford, Cotton, and Madewell had not provided any documentation of interim earnings; and that Rogers had "*provided Respondent with documentation he is not seeking back pay.*" (Italics in original) General Counsel's Exhibit 1(l).

As here pertinent, General Counsel's Exhibit 1(m) includes a letter dated January 21, 2003, from Joseph Hoffman, who is Counsel for General Counsel, to Mary Croft, of All Seasons Construction, Inc., advising her as follows:

This is to confirm our telephone conversation earlier today in which I informed you that the responsibility for requesting a postponement of the hearing in the matter referenced above [this proceeding] because of Mr. Angel's unavailability is yours. I informed you that you should send the request for a postponement to the following address:

William Cates
Associate Administrative Law Judge
....

I also advised you to provide any documentation you have (i.e., the e-mail informing Mr. Angel of his deployment) even though he has not received his formal written orders.

Please note that if you do not file the request, the hearing will take place as scheduled, with or without Mr. Angel's participation. Also, please note that it is in your best interest to file this request as soon as possible.

This exhibit also includes a letter to Judge Cates and Region 15 of the Board dated January 21, 2003 and stamped received by Region 15 of the Board on January 24, 2003, which reads as follows:

You were previously advised that Edward L. Angel, Colonel in the United States Air Force Reserves was put on alert that deployment orders were imminent. Colonel Angel is to report for duty on February 3, 2003 for a tour of approximately one year and will not be available for the February 10, 2002 [sic] scheduled hearing.

Please find attached an e-mail, which outlines the current status of the

¹ As pointed out in the index and description of formal documents, General Counsel's Exhibit 1(hh), this answer was received by facsimile on December 31, 2002, and the Region received a hard copy on January 3, 2003. General Counsel's Exhibit 1(k).

involuntary mobilization. In addition a copy of the actual orders will be forwarded upon receipt.

And finally, this exhibit includes an attachment which reads as follows:

Subj: FW: Recall to Active Duty for Colonel Edward L. Angel
 Date: 01/23/2003 5:25:08 PM Central Standard Time
 From: Edward.Angel@langley.af.mil
 To: CROFTMA@aol.com
 CC: Edward.Angel@langley.af.mil
Sent from the Internet (Details)

-----Original Message-----

From: Myers Ronald J Lt Col ACCCE/CEXX
 Sent: Thursday, January 23, 2003 5:36 PM
 To: Angel Edward L Col ACC/CE (E-mail)
 Cc: Waits Carolyn M TSgt ACC/CEXO (E-mail)
 Subject: Recall to Active Duty for Colonel Edward L. Angel

Colonel Angel, following is the status of your recall to active duty.

The request for your partial mobilization (PM) authority was approved by the Headquarters Air Combat Command Contingency Action Team. The request is now at the Pentagon in the War Mobilization Plans (WMP) office for their coordination and concurrence. We anticipate WMP concurrence early next week. This will allow you to meet your report no later than date of 3 February 2003. You are authorized a rental car. We have arranged your billeting. If you need any information before you report for duty on 3 February 2003, contact me

Ronald J. Myers, Lt. Col. USAF

On January 28, 2003, Region 15 of the Board issued an order rescheduling the hearing from February 10, 2003 to September 15, 2003, which order was mailed on January 28, 2003. General Counsel's Exhibits I(n) and (o), respectively.

On September 11, 2003, Region 15 of the Board issued a second order rescheduling the hearing to March 15, 2004, which order was mailed on September 11, 2003. General Counsel's Exhibits I(p) and (q), respectively.

On February 23, 2004 Region 15 of the Board issued an order postponing the hearing indefinitely, which order was mailed on February 23, 2004. General Counsel's Exhibits I(r) and (s), respectively.

On June 9, 2004 Region 15 of the Board issued an order setting hearing date. As here pertinent, the order reads as follows:

On February 23, 2004, the undersigned issued an Order Postponing Hearing Indefinitely for the Compliance Specification in the above cases based in Respondent's Representative Edward Angel serving active duty in the United States military, based on Mr. Angel's anticipated August 2004 return from active duty, the hearing in this matter is set for September 13, 2004. [General Counsel's Exhibits 1(t) and (u)]

On July 20, 2004 Region 15 of the Board issued a second order setting hearing date which rescheduled the hearing from September 13, 2004 to September 27, 2004. General Counsel's Exhibits I(v) and (w).

On September 22, 2004 Judge Lawrence Cullen, Acting Associate Chief Judge of the Board's Atlanta Branch Office of the Division of Judges, issued an order which reads as follows:

On September 22, 2004, Respondent, All Seasons Construction, Inc., filed a Motion for a Postponement of the scheduled hearing set for September 27, 2004, in these cases. On September 22, 2004, Counsel for General Counsel filed its Memorandum in Opposition to the Motion for Postponement of Hearing.

After due consideration, the Motion for Postponement is DENIED. [General Counsel's Exhibit 1(x)]

On September 27, 2004, Region 15 of the Board issued an order postponing the hearing indefinitely. General Counsel's Exhibits I(y) and (z).

On November 17, 2004, Region 15 of the Board issued a third order setting hearing date, General Counsel's Exhibit 1(aa). The order reads as follows:

On September 27, 2004, the undersigned issued an Order Postponing Hearing Indefinitely based upon an imminent settlement. However, the parties have failed to finalize the terms of that non-Board settlement. Accordingly,

IT IS HEREBY ORDERED that the hearing in this matter be, and it hereby is, set for March 7, 2005

The affidavit of service is General Counsel's Exhibit 1(bb).

Regarding any attempt to settle this matter, the following appears in Judge Vandeventer's June 29, 2001 decision in this case (See page 999 of *All Seasons Construction, Inc.*, supra.):

Finally, I find that the Regional Director properly set aside the informal settlement agreement dated June 2, 2000. Although Respondent [Angel was the only one who entered an appearance for the Respondent in the hearing before Judge Vandeventer.] denied its execution and approval [in its answer to the complaint paragraph], the copy of the settlement agreement in this record show[s] that it was indeed signed by Angel and approved by the Regional Director. Similarly, although Respondent denied that it had failed to abide by the terms of the settlement agreement [which, as indicated above, it denied executing], Angel stated on the record that Respondent had not paid any of the backpay and interest amounts, which were a part of the settlement agreement. In these circumstances, there can be no doubt that the Regional Director acted properly in setting the settlement agreement aside.

General Counsel's Exhibit 1(cc) is the fax of a letter to the Division of Judges in Atlanta, dated March 3, 2005, from Edward L. Angel, which is copied to Hoffman. The body of the letter reads as follows:

RE: All Seasons Construction, Inc.
15-CA-1478 ET AL Hearing Date 3/7/2005

....

5 In accordance with Section 102.4(e) of the Board's Rules and Regulations request the referenced hearing be rescheduled.

Enclosed please find a copy of my Military Orders. With kindest regards,

The military order, as here pertinent, reads as follows:

10

....

15	13. WILL REPORT TO (Unit and location)	14. REPORTING DATE	15. RELEASE DATE
	ACC/CE	(Hour) (YYYYMMDD)	(YYYYMMDD)
	129 ANDREWS ST	20050308	20050310
	LANGLEY AFB VA		

....

20 Air Force Reserve Member assigned as an Individual Mobilization Augmentee (IMA).

.... 21.TOUR-IND
Planning & Reporting Contingency Readiness

25 The letterhead on the March 3, 2005 above-described Angel letter reads as follows:

30 Edward L. Angel
950 Aero Drive
Shreveport, Louisiana 71107
318-226-9794 ~ Fax: 318-226-9798

35 It is noted that the following appears at the top of the page, in terms of this entry, on each of the three pages (cover sheet, letter, and military order): "Mar. 2. 2005 10:24 AM LEON ANGEL CONSTRUCTORS INC No. 2089."² No fax number is given for Leon Angel Constructors, Inc. The fax number on the cover sheet is the one given in the above-described letterhead, namely 318-226-9798.

40 General Counsel's Exhibit 1(dd) is Associate Chief Judge Cates' Order Granting Respondent's Request to Reschedule Hearing and Order Establishing New Hearing Date. The body of the order reads as follows:

45 On March 3, 2005, Respondent, by Edward L. Angel, filed a Request to Reschedule Hearing in the above-styled cases. As grounds for the Request, Mr. Angel attaches military orders requiring he report for duty on March 8, 2005, and be released from duty on March 10, 2005.

Counsel for General Counsel does not oppose a rescheduling.

50 ² More specifically, if the three pages are held upside down in terms of the content of the three documents, this entry would appear at the top.

5 ACCORDINGLY, Respondent's Request to Reschedule Hearing is GRANTED. The Hearing is rescheduled to commence at 9:00 a.m. on March 16, 2005, in Shreveport, Louisiana, before Judge John H. West at a location to be obtained by Counsel for General Counsel. Counsel for General Counsel will notify all parties of the exact location for the trial and Counsel for General Counsel will secure the services of an official court reporter.

 SO ORDERED.

10 Dated at Atlanta, Georgia, this 3rd day of March, 2005.

The March 3, 2005 certificate of service attached to this Order indicates, as here pertinent, that the Order was served facsimile and regular mail on

15 Mr. Edward Angel
All Seasons Construction, Inc.
950 Aero Drove [sic]
Shreveport, LA 71107-7106
FAX: (318)226-9798

20 General Counsel's Exhibit 1(ee) is Region 15's Order Confirming Hearing Site. The body of the Order reads as follows:

25 The hearing in the above-entitled matter, set on March 16, 2005, at 9:00 a.m. (CST), will be held in Courtroom 5, First Floor, Western District of Louisiana, 300 Fannin Street, Shreveport, Louisiana.

 Dated at New Orleans, Louisiana, this 9th day of March 2005.

30 The March 9, 2005 affidavit of service, General Counsel's Exhibit 1(ff), indicates that the Order was served by regular mail on, as here pertinent,

35 Edward L. Angel, President
All Seasons Construction, Inc.
950 Aero Drive
Shreveport, LA 71107-7106

40 Mary A. Croft, Office Manager
All Seasons Construction, Inc.
950 Aero Drive
Shreveport, LA 71107-7106

45 A trial was held in this backpay proceeding on March 16, 2005, at Shreveport. Neither Angel nor anyone else representing Respondent appeared at the March 16, 2005, trial. Accordingly, no witnesses were called by Respondent, no evidence was introduced by the Respondent, and the Respondent did not challenge on the record any of the evidence introduced by Counsel for General Counsel. Upon the entire record, including my observation of the demeanor of the witness called by Counsel for General Counsel, and after due
50 consideration of the brief filed by Counsel for General Counsel on April 22, 2005, I make the following findings and conclusions of law:

At the March 16, 2005 trial herein Counsel for General Counsel introduced, in addition to the formal documents described above, General Counsel's Exhibit 1(gg) of the formal documents, which is an Amended Compliance Specification and Notice of Hearing dated March 10, 2005. It was received at the trial herein on March 16, 2005, with Hoffman stating as follows:

The theory behind the Region's calculations has not changed nor has the gross pay calculations contained in Appendix A, only the interim earnings [which] were deducted from each discriminatee's share of gross back pay has changed, and that's Appendix B.

The information was entered into the tables of Appendix B incorrectly, leading to an erroneous back pay liability figure in Appendix C.

According to Respondent's answer, they take issue only with the way gross back pay was calculated and that hasn't changed.

JUDGE WEST: General Counsel's 1(gg), did you ever supply a copy of that document to the Respondent in this case?

MR. HOFFMAN: I did, Your Honor, two times; one time was by e-mail and I have a copy of that transmittal e-mail if Your Honor would like to enter it into evidence. He received it the same time the Division of Judges received a copy. [Transcript pages 7 and 8]

At the March 16, 2005 trial herein Counsel for General Counsel then introduced General Counsel's Exhibit 2, which, reads as follows:

From: Hoffman, Joseph A.
Sent: Tuesday, September 07, 2004 4:36 PM
To: 'edward.angel@langley.af.mil'
Cc: Cates, William N.
Subject: All Seasons Construction, Inc., Case Nos. 15-CA-14748, et al

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 15
1515 Poydras Street, Suite 610
New Orleans, LA 70112-3723

Telephone: 504-589-6392
Fax: 504-589-4069
joseph.hoffman@nrlb.gov
region15@nrlb.gov

September 7, 2004

Colonel Ed Angel
All Seasons Construction, Inc.
edward.angel@langley.af.mil

Re: All Seasons Construction, Inc.
Case No. 15-CA-14748, -14793, -14816 & -15156

Dear Colonel Angel:

I am writing in regard to the matter referenced above. We spoke briefly today about the possibility of settlement and the possibility that All Seasons has no assets. However,

now am writing to inform you that, should this matter go to a hearing, I will be seeking to amend the Compliance Specification the morning of the hearing. While the Specification is essentially correct, errors were made. The amounts owed to the individuals were stated correctly, however, some of the information in the appendices was entered incorrectly. These errors did not affect the total amounts owed or the method used to calculate the amounts owed. Attached, please find a copy of the Specification with the correct information. If you do not have Microsoft Word and/or Excel, or cannot open Word or Excel documents, please let me know.

Thank you for your prompt attention in this matter.

Yours truly,

Joseph A. Hoffman, Jr.
Field Attorney

cc: Hon. William N. Cates, Division of Judges, william.cates@nlrb.gov

This document was received in evidence.

At the March 16, 2005 trial herein Counsel for General Counsel introduced General Counsel's Exhibits 3 and 4, which are two subpoenas duces tecum, B-469663 and B-469664, respectively. Hoffman forwarded the two to the custodian of records of the Respondent. Both of the subpoenas are dated March 10, 2005, and both were returnable at 10 a.m. on March 16, 2005 at courtroom 5, First Floor, Western District of Louisiana, 300 Fannin Street, Shreveport. According to Hoffman, see transcript pages 7 and 8, the former was served by regular mail dated March 10, 2005, and the latter was served by certified mail dated March 10, 2005, return receipt requested. Both subpoenas were received in evidence.

At the March 16, 2005 trial herein Counsel for General Counsel introduced General Counsel's Exhibit 5, which is a letter dated March 15, 2005. It reads as follows:

ELA Group, Inc.
950 Aero Drive
Shreveport, Louisiana 71107
318-226-9794 ~ Fax: 318-226-9798

March 15, 2005

Joseph A. Hoffman[,], Jr[.]
National Labor Relations Board
1515 Poydras Street, Suite 610
New Orleans, LA 70112-3723

RE: All Seasons Construction, Inc.
Case No. 15-CA-14748, et al

Dear Mr. Hoffman:

I am writing in regards to a subpoena I received in yesterday's mail. It is a subpoena for the Custodian of Records of All Seasons Construction, Inc. which is Edward L. Angel. Mr. Angel is out of town. Had someone contacted this office to coordinate the scheduling

of this hearing, I would have advised them of this.

If you wish to re-schedule, I am in the office from 8 to 12, Monday through Friday. Otherwise, Mr. Angel will not be present. If you have any questions, please contact me at 318-226-9794 or 318-469-1322 (cell).

Sincerely,

Pam Stevens
Administrative Assistant

CC: Division of Judges
Honorable Judge William Cates

At the March 16, 2005 trial herein, Hoffman stated that he received a fax of this letter at his hotel in Shreveport on the night of March 15, 2005. As noted above, Region 15's office is in New Orleans, Louisiana, which is approximately 350 miles from Shreveport. This letter was received in evidence.

As indicated above, Judge Cates' Order rescheduling the hearing at Angel's behest was faxed and mailed on March 3, 2005, to Angel at the number and address, respectively, supplied by Angel. From March 3, 2005 until March 15, 2005, the day before the trial herein, Angel did not again, in a timely manner, request to have the trial rescheduled. Respondent's 11th hour letter set forth above does nothing other than to belatedly (Considering the travel distances involved and the 9 a.m. starting time of the trial on March 16, 2005, Angel had to appreciate the fact that the participants either would be in Shreveport at the time of the letter or on their way to Shreveport.) advise that Angel and the Respondent were not going to participate in the scheduled trial. Just as Respondent falsely denied signing the June 2, 2000 settlement agreement and it falsely denied that it had failed to abide by the terms of the June 2, 2000 settlement agreement, here again Respondent is not being candid. Respondent does not specifically refer to Judge Cates' March 3, 2005 Order or explain why it waited to the 11th hour to claim that there was a problem with scheduling.

The Amended Compliance Specification, a copy of which according to Hoffman's statement on the record and the above-described September 7, 2004 e-mail from Hoffman to Angel was previously forwarded to Angel, was received as General Counsel's Exhibit 1(gg). Tara Yoest, Region 15's Compliance Officer, who as here pertinent, is responsible for obtaining compliance with court judgments, testified that she has been the Compliance Officer for Region 15 for about 3 months; that while she did not prepare the Amended Compliance Specification,³ she was familiar with it since she reviewed the specification and the files; that the specification comports with normal Board procedures for calculating back pay liability; that the back pay period started on December 2, 1997 since that was the day on which five of the discriminatees were unlawfully refused hire⁴; that Gafford, Cotton, and Madewell are discriminatees since the first two were unlawfully laid off on December 17, 1997, and the third was unlawfully laid off on April 28, 1998; that the Region calculated back pay in this case by determining a control group which is described in Appendix A of the specification; that the item described in Appendix A1 as "Trim" represents work completed by Bean Construction (Bean); that based on an affidavit given

³ The Amended Specification was prepared by Annie Archie, who was Yoest's predecessor and who retired.

⁴ Myers, Cirulli, Mills, Rogers, and Watkins.

by Bean, the Board found that Respondent unlawfully contracted \$7,500.00 in carpentry work to Bean, \$4,125.00 of which was paid to workers as wages; that the Region divided that figure into two amounts with one for the week ending December 16, 1997, and one for the week ending December 30, 1997 since labor costs were allocated into the weeks in which the wages were paid; that in addition to the “Trim” work there is an individual, Jeffrey Miller, included in the control group for the fourth quarter of 1997 because he was hired by the Respondent on December 9, 1997, which was 7 days after the five above-described individuals were refused hire; that Appendix A2 is for the first quarter of 1998; that Will Young and Darrell Frazier were included in the control group for the first quarter of 1998 because they did the carpentry work for Respondent during the quarter; that she did not know the dates Young and Frazier were hired, she did not know whether they were hired before or after the discriminatees, but they are not listed on Appendix A1 as working during the fourth quarter of 1997; that the individuals selected for the control group for each individual quarter are the only ones in the file who were doing carpentry work during that quarter; that it is safe to conclude that if an individual is not listed in Appendix A1, that person was not performing carpentry work during that quarter; that some of the individuals listed on A3 are not listed on A2, namely Russ Lindsey, Wayne Helms, and Jim Foley; that the same is true for all of the individuals included in the control group, namely that they were hired to perform carpentry work during the quarter indicated in the Appendix; that the Region got the information contained in Appendix A from records supplied by the Respondent, and based on that information, the Region determined that the gross amount of backpay owed is \$65,540.76 and this is indicated in Appendix C to the specification; that Appendix B of the specification shows how the gross back pay was divided amongst the discriminatees and the amount of interim earnings deducted from the gross back pay and the net back pay; and that the Region got the information about the discriminatees’ interim earnings from the discriminatees.

Contentions

On April 22, 2005 Counsel for General Counsel filed a brief in this proceeding. The Certificate of Service for the brief indicates, as here pertinent, that a copy of the brief was served April 21, 2005 by overnight delivery upon Edward A. Angel, All Seasons Construction, Inc., 950 Aero Drive, Shreveport, Louisiana 71107. The following appears on page 3 of Counsel for General Counsel’s brief:

During the hearing of this matter, Counsel for General Counsel moved to amend the Compliance Specification. The Amended Compliance Specification was identified and entered into the record as General Counsel’s Exhibit 1(gg). On September 7, 2004, Respondent and the Division of Judges were provided a copy of the proposed Amended Compliance Specification (See GC 2). As noted on the record (Tr. 6-7), the General Counsel offered the Amended Compliance Specification to correct mathematical mistakes in Appendix “B” of the original Compliance Specification. [Emphasis added]

Respondent does not in any way challenge the indication that it was provided a copy of the proposed Amended Compliance Specification on September 7, 2004. Counsel for General Counsel points out that the backpay period for all discriminatees continued until October 16, 2001 when the Respondent ceased performing carpentry work. Counsel for General Counsel contends that an appropriate measure of backpay is calculated based on the hours or earnings of a control group of employees whose work, earnings, and other conditions of employment are comparable to those of discriminatees; that employees who were selected to perform carpentry work during the backpay period were selected for the control group; that the Region determined that had Respondent not acted unlawfully, one or more of the discriminatees would have been hired to perform carpentry work during the backpay period; that the burden of proving a

discriminatee would not have been hired to perform subsequent work is that of Respondent, *Dean General Contractors*, 285 NLRB 573, 575 (1987); that because the Region was unable to determine which of the discriminatees would have been hired to perform the work, the Region determined that the gross backpay amount should be divided among all discriminatees; that not all of the discriminatees will receive backpay because some of them have interim earnings greater than their share of the gross backpay amount; that only Myers, Cirulli, Mills, Gafford, Cotton, and Madewell are entitled to backpay; that the gross backpay owed is \$65,540.76; that offsetting the gross amount of backpay are the interim earnings of the discriminatees amounting to \$28,084.89; and that the net backpay to the discriminatees is \$37,455.87, plus interest accrued.

Analysis

General Counsel has the burden of proving as nearly as possible what the discriminatees would have earned but for the unlawful conduct of the Respondent. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and *NLRB v. Brown & Root, Inc.*, 311 F. 2d 447 (8th Cir. 1963). General Counsel has the burden of establishing a formula for the calculation of gross backpay due to the discriminatees, but in many cases it is difficult to ascertain the precise amount due, and, therefore, a wide range of discretion is accorded the fashioning of such a formula provided it is reasonably designed to produce approximations and it is not arbitrary and unreasonable. Once General Counsel has established a reasonable formula, the burden then falls upon Respondent to establish facts which would negate or diminish the existence of liability. *Brown & Root, Inc.*, supra. Board calculations based on calendar quarters have been approved. *Id.*

Paragraph 2(a) of the compliance specification indicates that “[a]n appropriate measure of the gross backpay for each discriminatee is an average of the wages received in a quarter by similarly situated journeyman carpenters (herein called the Control Group) who worked for Respondent during the period December 18, 1997 – October 16, 2001.” In his amended response to the compliance specification, Angel argues that “2(a) The measure of gross back pay for each discriminatee is incorrect. Two previous employees and one specialized carpenter are part of the back pay calculations. Decision of the NLRB does not find for those to be part of the calculations.” As pointed out in the NLRB Casehandling Manual, Part Three - - Compliance Proceedings, one of the basic backpay formulas used by the Board and approved by the courts through the years is a formula which uses the average earnings (or hours) of a representative employee (or employees) who worked in a job similar to the discriminatees’ before the unfair labor practice and during the backpay period.⁵

Also, with respect to paragraph 6 of the compliance specification, Angel, as here pertinent, argues in his amended response to the compliance specification, that Roy Myers is the Office Manager and an organizer for the Brotherhood of Carpenters & Joiners of America, Regional Council Local 764; and that “[a] 1992 U.S. Supreme Court decision states the employer has the right to bar non-employee union organizers from entering an employer’s private property; this happened on two occasions.” First, as pointed out in the underlying unfair labor

⁵ *Rice Lake Creamery Co.*, 151 NLRB 1113, 1118-1119 (1965), aff’d. regarding backpay formula 365 F.2d 888 (D.C. Cir. 1966); *International Trailer Co.*, 150 NLRB 1205, 1208-1210 (1965); *Brown & Root*, 132 NLRB 486, 488-489 (1961), enf’d. concerning formula used 311 F.2d 447, 452-453 (8th Cir. 1963); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337-1338, 1353 (1956), enf’d. 255 F.2d 284 (5th Cir. 1958); *West Texas Utilities Co.*, 109 NLRB 936 (1954).

practice decision in this proceeding, Myers, more than once, applied for employment with the Respondent. Second, undoubtedly the 1992 case Angel refers to is *Lechmere, Inc.*, 502 U.S. 527 (1992). There the United States Supreme Court was dealing with an attempt to organize on private property, and the decision spoke to property rights vis-à-vis nonemployee union access to the involved employees. Here what is involved is an application for employment. And third, the United States Supreme Court in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995) approved the Board's position that the definition of "employee" in Section 2(3) of the National Labor Relations Act, as amended, (Act) includes even professional organizers who obtain employment with an employer solely for the purpose of organizing that employer's work force.

In my opinion General Counsel has established a reasonable formula and he has met his burden.

Since Respondent chose not to participate in the trial on the backpay compliance specification, obviously Respondent has not demonstrated the General Counsel's approach is arbitrary or unreasonable in these circumstances. Also, Respondent has failed to show that the backpay liability should be mitigated or eliminated.

On April 22, 2005, Counsel for General Counsel filed a Motion to Reopen the Record and Include Attached Affidavit of Joseph A. Hoffman, Jr., who as noted above is Counsel for General Counsel. In his Motion, Hoffman submits that Angel was not present for the compliance hearing in this matter; that the March 15, 2005 letter sent to the Board for Angel indicated that Angel was out of town and would not be present for the hearing; that within one hour of the close of the compliance hearing on March 16, 2005 Hoffman found Angel in his office in Shreveport; that Respondent may assert, in this proceeding or a future proceeding, that its right to due process was violated because the hearing took place despite Angel's not being there; that the record contains an assertion, General Counsel's Exhibit 5, of the reason for Angel's not being at the compliance hearing; and that because there exists evidence that directly refutes the alleged reasons for Angel not being at the March 16, 2005 compliance hearing, which did not exist until after the record was closed, fairness requires that the record be reopened so this new evidence can be included. The attached affidavit reads as follows:

AFFIDAVIT

Parish of Orleans
State of Louisiana

I, Joseph A. Hoffman, Jr., being first duly sworn upon my oath, hereby state as follows:

My work address is 1515 Poydras Street, Suite 610, New Orleans, Louisiana, 70112.

My daytime telephone number is (504)589-6392.

I am employed as an attorney with the National Labor Relations Board, Region 15. I have worked for the Board for about five years.

On March 16, 2005, Tara Yoest, Region 15's Compliance Officer, and I were in Shreveport, Louisiana, for a compliance hearing in All Seasons Construction, Inc., Case Nos. 15-CA-14748, et al. The day before, Pam Stevens, Ed Angel's administrative assistant, faxed a letter to the Region and to the Division of Judges, Atlanta, informing us that Mr. Angel would not be present at the hearing because Mr. Angel would be out of

Counsel for General Counsel's Motion includes a Certificate of Service signed by Hoffman which states, as here pertinent, as follows:

I hereby certify that on April 21, 2005, I have caused to be served a copy of the preceding Motion to Reopen the Record and Include Attached Affidavit on the following parties, by overnight delivery:

Edward A. Angel
All Seasons Construction, Inc.
950 Aero Drive
Shreveport, Louisiana 71129

Respondent did not reply to Counsel for General Counsel's Motion to Reopen the Record and Include Attached Affidavit. Consequently, Respondent does not oppose the request. Indeed the motion may be treated as conceded. As pointed out by Judge Lawrence Cullen in *Raven Government Services*, 331 NLRB 651, 657-658 (2000),

Section 102.35(8) of the Board's Rules and Regulations authorizes administrative law judges 'to order hearings reopened' without setting the standard for doing so. I am guided however, by Section 102.48(d) of the Board's Rules and Regulations setting the standard for requests to reopen the record filed with the Board which are that 'a motion to reopen the record shall state briefly the additional evidence to be adduced, why it was not presented previously, and that, if addressed and credited, it would require a different result.' [Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.]

Counsel for General Counsel's Motion gives the additional evidence to be adduced in the form of an affidavit. And he explains why the evidence was not presented previously. With respect to the requirement that if the evidence is addressed and credited, it would require a different result, this appears to speak to a situation where the Board has already reached a decision since the section refers to "reopening of the record after the Board decision or order." Here the Board has not reached a decision on the supplemental compliance hearing. Indeed, I had not yet decided the case when Counsel for General Counsel filed his Motion. As pointed out by Counsel for General Counsel, if the record is not reopened and the affidavit received into evidence, an erroneous impression will be left on the record, namely that Angel was not in town when, as demonstrated by the affidavit, he was in town but chose not to be present at the supplemental compliance hearing on March 16, 2005. Additionally, Section 102.177(d) of the Board's Rules and Regulations indicates:

Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

Here, as in the underlying unfair labor practice proceeding, Angel chose to appear in a representative capacity. He had a subordinate forward a correspondence to Region 15 of the Board and to the Division of Judges, Atlanta Branch indicating that he was out of town and would not be able to be present at the March 16, 2005 supplemental compliance hearing when, according to Hoffman's affidavit, it appears that Angel was in Shreveport at the time of the

hearing.⁶ Pursuant to Section 102.177 of the Board's Rules and Regulations the judge involved in a proceeding can make a referral to the Investigating Officer. In the circumstances extant here, I believe it would be better to recommend that Angel be investigated for possible misconduct. If a licensed attorney engaged in the conduct involved here, undoubtedly his or her conduct would be investigated to determine if he or she should be sanctioned. In this regard, the Board's Rules and Regulations do not appear to differentiate between an attorney and a representative. I believe that it would be best to have the Board decide whether Angel's conduct should be investigated.

The Board in *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn.1 (1987) pointed out that evidence that did not exist at the time of the trial because it relates to events that occurred after the close of the trial in not "newly discovered." Here the event which is the subject of the above-described affidavit is Angel's absence from the trial. While Hoffman's meeting with Angel took place within an hour of the close of the hearing, it relates back to what occurred at the trial itself, namely contrary to Respondent's assertions, Angel was in Shreveport and he chose not to be present at the trial. Counsel for General Counsel's Motion to Reopen the Record and Include Attached Affidavit is hereby granted. The affidavit with the Motion and the Certificate of Service is received in evidence as General Counsel's Exhibit 6. Hoffman's unchallenged affidavit is credited.

SUPPLEMENTAL ORDER⁷

Respondent All Seasons Construction, Inc., its officers, agents, successors, and assigns, are hereby ordered to pay the persons listed below the amount set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Ron Myers	\$9,267.61
Paul Cirulli	3,884.48
Randolph C. Mills	9,267.61
Sims Gafford	3,693.96
Harold Cotton	8,832.36
Ronald Madewell	2,509.85

Dated, Washington, DC

John H. West
Administrative Law Judge

⁶ I was originally scheduled to hear this case on March 7, 2005. That date was rescheduled at the behest of Angel who asserted that he was not available on March 7, 2005. Did he lie about that also? If he did, are the military orders he forwarded to Judge Cates to obtain the rescheduling valid?

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be deemed waived for all purposes.